

Feb 21, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAKE SHREVES,

Plaintiff,

v.

FRONTIER RAIL CORPORATION  
and YAKIMA CENTRAL RAILWAY  
CORPORATION,

Defendants.

No. 1:19-cv-03012-SMJ

**ORDER GRANTING MOTION  
FOR PROTECTIVE ORDER**

Before the Court is Defendants Frontier Rail Corporation and Yakima Central Railway Corporation's Motion for a Protective Order, ECF No. 33. Having reviewed the record and the file in this matter, the Court is fully informed. For the reasons set forth below, the Court grants Defendants' motion and incorporates the proposed protective order with limited exception.

**BACKGROUND**

Plaintiff brought this action under the Federal Employer's Liability Act (FELA) to recover for injuries he sustained after allegedly falling into a hole near railroad tracks while he alleges he was acting as an employee of Defendants. *See*

1 ECF No. 10 at 3–7. Plaintiff also brought claims under the Federal Railroad Safety  
2 Act (FRSA) alleging he was terminated in retaliation for reporting his workplace  
3 injury and hazardous workplace conditions. *See generally* ECF No. 10.

4 The parties have begun to engage in discovery and propounded requests for  
5 production of documents. *See, e.g.*, ECF No. 37-4. Defendants represent they have  
6 sought discovery regarding Plaintiff’s medical history, including requests for  
7 production of medical records and subpoenas to Plaintiff’s medical providers. ECF  
8 No. 33 at 3–4. Plaintiff sought production of several categories of documents,  
9 including Defendants’ “corporate structure and ownership” and “year-end  
10 profit/loss statement[s]” as well as “Plaintiff’s entire, unredacted, personnel file,”  
11 and “each and every document and communication . . . between [the Occupational  
12 Safety and Health Administration (“OSHA”)] and/or the Department of Labor and  
13 [Defendants or defense] counsel in connection with Plaintiff’s OSHA Complaint  
14 under the FRSA.” *See* ECF No. 37-5.

15 On November 11, 2019, defense counsel emailed Defendants’ discovery  
16 responses to Plaintiff’s counsel. ECF No. 34-1 at 7. Defense counsel also attached  
17 a proposed stipulated protective order intended to govern the production of  
18 confidential information in discovery. *Id.*; *see also* ECF No. 33-1 (proposed  
19 protective order). Four days later, Plaintiff’s counsel responded. *Id.* at 6. Plaintiff’s  
20 counsel declined to stipulate to the proposed protective order because Defendants

1 failed to provide justification for it. *Id.* Plaintiff’s counsel also described  
2 Defendants’ discovery responses as “ridiculous” and wrote that if defense counsel  
3 was “confused, or unsure how to comply with the federal rules, please let me know  
4 and I will be happy to provide you with some guidance.” *Id.* at 7.

5 Several days later, defense counsel responded that a protective order was  
6 necessary to protect “confidential business information” as well as information  
7 about individuals not party to the litigation. *Id.* at 5. Defense counsel also made  
8 clear the proposed protective order applied equally to confidential documents  
9 produced by Plaintiff, namely Plaintiff’s medical records. *Id.* Plaintiff’s counsel  
10 replied twenty minutes later, again declining to stipulate to the protective order, and  
11 reiterating Plaintiff’s position that Defendant’s discovery responses were “full of  
12 improper and unsubstantiated boilerplate objections.” *Id.* at 4.

13 The next day, defense counsel responded that he hoped to reach agreement  
14 to avoid unnecessary motions practice and to protect against “dissemination of  
15 confidential business information and personal information.” *Id.* at 3. Plaintiff’s  
16 counsel replied:

17 //

18 //

19 //

20 //

1 So here's how this actually works. As the party seeking a protective  
2 order, the burden is yours to demonstrate that one is necessary. That  
3 requires you to specify what exactly you feel needs to be protected. So  
4 for example, you literally have to identify whatever the document is,  
5 what the document contains that you think makes it subject to a protect  
[sic] order, and why there would be harm to your client in the absence  
of a protective order. You are trying to do this in reverse and you simply  
are not going to get agreement from us by making vague references to  
confidential business information and personal information.

6 Quit screwing around and wasting everyone's time. Fix your discovery  
7 responses to reflect the fact that you all have law degrees and a  
rudimentary understanding of the [Federal Rules of Civil Procedure].  
8 And if you manage to make some actual showing of a need for a  
protective order we can discuss then. But the time for you to do so is  
9 quickly running out because we are ready to file our motion to compel.

10 *Id.* at 3.

11 Defense counsel responded and once again stated Defendant's desire to reach  
12 agreement without the Court's involvement. *Id.* at 2. Plaintiff's counsel responded:  
13 "You have not identified anything that needs to be protected. Please stop emailing  
14 on this subject." *Id.* The parties exchanged a similar pair of emails but failed to  
15 reach a solution. *Id.* at 1.

16 On November 22, 2019, Defendant moved for a protective order. *See* ECF  
17 No. 33. Defendants represent one is needed because the employment relationship  
18 between Plaintiff and Defendants is disputed and will necessitate discovery of  
19 confidential business information. *Id.* at 7. Defendants also contend discovery will  
20 include private information of current and past employees who are not party to the

1 litigation, as well as Plaintiff's private health records. *Id.* at 8.

2 Plaintiff argues a protective order is unnecessary because Defendants have  
3 not identified any information warranting protection and because their discovery  
4 responses include "boilerplate objections." ECF No. 36 at 2. Plaintiff also argues  
5 Defendants failed to engage in a meaningful "meet-and-confer" before moving for  
6 a protective order. *Id.* at 3–5. As such, Plaintiff requests an award of fees and costs  
7 incurred in briefing his response to Defendants' motion, contending Defendants'  
8 conduct is "at the height of bad faith." *Id.* at 10.

## 9 LEGAL STANDARD

10 Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain  
11 discovery regarding any nonprivileged matter that is relevant to any party's claim  
12 or defense." This is a liberal standard, and information "need not be admissible in  
13 evidence to be discoverable." *Id.* But the right to discover relevant information is  
14 neither absolute nor immune from restriction. Accordingly, "[t]he court may, for  
15 good cause, issue an order to protect a party or person from annoyance,  
16 embarrassment, oppression, or undue burden or expense," including by prescribing  
17 the terms under which discovery is provided. Fed. R. Civ. P. 26(c)(1).

18 The party seeking a protective order "bears the burden of showing specific  
19 prejudice or harm will result if no protective order is granted. *Phillips ex rel. Estates*  
20 *of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002) ((citing

1 *Beckman Indus., Inc. v. Intern. Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)). Broad  
2 and unsubstantiated concerns premised on conjecture are insufficient. *Id.* If the  
3 moving party establishes good cause warrants a protective order, the Court must  
4 weigh “the public and private interests to decide whether a protective order is  
5 necessary.” *Id.* (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir.  
6 1995)). The Court is vested with “broad discretion . . . to decide when a protective  
7 order is appropriate and what degree of protection is required.” *Seattle Times Co. v.*  
8 *Rhinehart*, 467 U.S. 20, 36 (1984).

## 9 DISCUSSION

### 10 A. Defendants satisfied the meet-and-confer requirement

11 Prior to bringing a motion for a protective order, a litigant must meet and  
12 confer with the opposing party “in an effort to resolve the dispute without court  
13 action,” or at least attempt to do so. Fed. R. Civ. P. 26(c)(1). Plaintiff contends  
14 Defendants failed to engage in a “meaningful” meet-and-confer and are therefore  
15 prohibited from seeking the Court’s intervention. ECF No. 36 at 3.

16 Having reviewed the record in this matter, the Court concludes Defendants  
17 attempted in good faith to meet-and-confer before moving for a protective order.  
18 On no fewer than four occasions, defense counsel invited Plaintiff’s counsel to  
19 discuss the proposed protective order, and the evidence Defendants believed  
20 necessitated it, over the phone. *See* ECF No. 34-1 at 1–7. Plaintiff’s responses to

1 those invitations were consistently hostile and unprofessional.<sup>1</sup> *See, e.g., id.* at 3  
2 (“Fix your discovery responses to reflect the fact that you all have law degrees and  
3 a rudimentary understanding of the [Federal Rules of Civil Procedure].”). At one  
4 point, Plaintiff’s counsel told defense counsel to *cease* further attempts to discuss  
5 the proposed protective order and arranging a time to meet and confer. *See id.* at 2  
6 (“You have not identified anything that needs to be protected. Please stop emailing  
7 on this subject.”).

8 To satisfy the meet-and-confer requirement of Rule 26(c)(1), defense counsel  
9 needed only “attempt[] to confer” in good faith with opposing counsel. Defense  
10 counsel was not obligated to, as Plaintiff appears to contend, provide or describe  
11 specific, individualized documents or information warranting a protective order.  
12 *See* ECF No. 36 at 3–4. Even if defense counsel were so obligated, it is possible

---

13  
14 <sup>1</sup> The Court wishes to emphasize that conduct such as Plaintiff counsel’s reflected  
15 in the email exchange with defense counsel is unacceptable and will not be tolerated  
16 moving forward. *See generally* ECF No. 34-1. Counsel practicing before this Court  
17 are to conduct themselves with fairness and civility. *See* ECF No. 30 at 15; *see also*  
LCivR 83.1(j)(1) (“I will be courteous and fair.”), (5) (“I will always conduct myself  
professionally, as if I were in the presence of a judge.”). Plaintiff’s counsel,  
admitted *pro hac vice*, is held to this standard, yet his responses to defense counsel’s  
emails fell below it.

18 Plaintiff’s counsel attributes his conduct to “irritation and aggravation” with  
19 “obstructionist discovery behavior.” ECF No. 36 at 4. The proper method to obtain  
20 relief for those frustrations is a motion filed with the Court, not berating or belittling  
the qualifications of opposing counsel. Plaintiff’s counsel is therefore warned that  
continued open hostility or discourteous conduct, regardless of to whom it is  
directed or how it is justified, will result in sanctions.

1 defense counsel would have offered greater detail about the evidence for which  
2 Defendant sought protections during a telephonic meet-and-confer. Plaintiff's  
3 counsel repeatedly spurned defense counsel's offers to engage in such discussions.  
4 The Court will not now entertain his complaints that defense counsel failed to try.

5 **B. Defendants have shown good cause for a protective order**

6 The Court finds Defendants have shown good cause for a protective order.  
7 Plaintiff has propounded requests for sensitive information regarding Defendants'  
8 businesses, including their organizational and ownership structures and financial  
9 records. ECF No. 37-5 at 3, 8. The Court credits Defendants' argument that  
10 dissemination of this information outside the litigation could result in competitive  
11 harm. *See* ECF No. 38 at 8–9 (“Defendants are operating small businesses in a  
12 highly competitive environment and must protect themselves from competitors who  
13 may attempt to assume control of their customers and impact their financial  
14 livelihoods.”). Moreover, the Court finds the risk has been established with the  
15 requisite particularity. Defendants need not produce every document which may be  
16 covered by the protective order to obtain reasonable protections against unnecessary  
17 disclosure.

18 Plaintiff's opposition to Defendants' motion is directed primarily at what  
19 Plaintiff perceives to be “obstructionist discovery behavior” including vague and  
20 overbroad objections to Plaintiff's discovery requests. *See* ECF No. 36 at 4.



1 However, the proposed protective order would in no way obstruct Plaintiff's access  
2 to discoverable evidence. Rather, it will prohibit the inappropriate dissemination of  
3 confidential material, and in that way facilitate, rather than hamper, the discovery  
4 process.<sup>2</sup> See ECF No. 38 at 1–3. Indeed, the Court agrees with Defendants that “[i]t  
5 is not clear from Plaintiff's Opposition why Plaintiff opposes the proposed  
6 protective order” as “[t]here are no provisions cited that Plaintiff believes are unfair  
7 or unduly restricting.” *Id.* at 2–3. The proper avenue to challenge Defendants'  
8 discovery requests is a motion to compel, which Plaintiff's counsel repeatedly  
9 threatened to file in his emails to defense counsel. See, e.g., ECF No. 34-1 at 3  
10 (“[T]he time for [Defendant] to [“fix” its discovery responses] is quickly running  
11 out because we are ready to file our motion to compel.”). Those arguments are not  
12 well taken here and are insufficient to establish that a protective order is  
13 unwarranted.

14 Having found good cause exists to enter a protective order, the Court also  
15 finds the balance of the public and private interests tips in favor of a protective  
16 order. *Phillips*, 307 F.3d at 1210–11. Though the public's interest in open judicial  
17 proceedings is strong, the evidence Defendants contend warrants protection will not  
18

---

19 <sup>2</sup> Plaintiff even concedes that the circumstances of this case warrant a protective  
20 order, albeit one “narrowly tailored” to cover only Plaintiff's medical and financial  
records. See ECF No. 36 at 4 n.2. Plaintiff's blatant attempt to have his cake and eat  
it too is not persuasive.

1 be of any particular interest to the public. Weighed against the harm that could result  
2 from the improper disclosure of those documents, the Court finds a protective order  
3 warranted.<sup>3</sup> *Id.*

4 **C. With limited exception, the protective order is reasonable**

5 Having reviewed the provisions of Defendants’ proposed protective order,  
6 the Court finds it reasonable and incorporates it by reference with one exception. A  
7 party wishing to file material under seal must provide “compelling reasons  
8 supported by specific factual findings” establishing that the need for confidentiality  
9 of the information contained in the proposed sealed document outweighs the  
10 public’s interest in disclosure. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d  
11 1172, 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331  
12 F.3d 1122, 1135 (9th Cir. 2003)). Read broadly, the proposed protective order  
13 permits either party to file material designated confidential under seal without leave  
14 of the Court. *See* ECF No. 33-1 at 11. That provision is unacceptable. Any party  
15 wishing to file material under seal shall file an appropriate motion and set out a  
16 sufficient justification overcoming the public’s interest in the transparency of the  
17 judicial process.

---

18  
19 <sup>3</sup> Plaintiff’s request for an award of cost and fees incurred in briefing his opposition  
20 to Defendants’ motion, *see* ECF No. 36 at 10, is **DENIED**. As an initial matter,  
Federal Rule of Civil Procedure 37(a)(5) does not appear to allow for such an award  
in connection with a motion for a protective order. In any event, the Court obviously  
disagrees that Defendants’ motion was “not substantially justified.”

Accordingly, **IT IS HEREBY ORDERED:**


1. Defendants' Motion for a Protective Order, **ECF No. 33**, is **GRANTED**.

2. Defendants' proposed protective order, ECF No. 33-1, is **APPROVED IN PART** and **INCORPORATED BY REFERENCE IN PART** as described above.

A. Any party wishing to file material under seal shall file an appropriate motion to seal and set out a sufficient justification.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to all counsel.

**DATED** this 21st day of February 2020.

  
SALVADOR MENDEZ, JR.  
United States District Judge